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Ang Game Hong & Anor v Tee Kim Tiam & Ors

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NO B-01(NCVC)(W)-116–04 OF 2016
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
18 APRIL 2018

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Civil Procedure — Jurisdiction — Concurrent jurisdiction — Land matter — Dispute over ownership of land — High Court allowed judgment in default and recorded consent judgment between parties — Another High Court set aside judgment in default and consent judgment — Whether High Court could set aside judgment of another High Court with concurrent jurisdiction — Whether principles of res judicata applied

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Land Law — Indefeasibility of title — Claim — Dispute over ownership of land — High Court allowed judgment in default and recorded consent judgment between parties — Another High Court set aside judgment in default and consent judgment — Whether there was evidence of fraud — Whether indefeasibility of title defeated merely on failure of registrar to notify caveator of removal of caveat on land — Whether land title indefeasible

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This was an appeal against the decision of the High Court in allowing the first respondent's ('the plaintiff') action for a declaration that he was the bona fide purchaser and proprietor of a piece of land. The land was originally registered under the second respondent's ('the first defendant') father ('TYL'). Upon TYL's death, vide a distribution order, the first defendant inherited the land. TYL had a deceased brother ('TTK') who, during his lifetime, married the first appellant ('the second defendant') and they had a son, the third appellant ('the third defendant'). The second and third defendant contended that the land was registered under TYL's name and TYL had transferred the land to the second defendant in the presence of the first defendant. In 2004, the second defendant filed an action at the High Court against the first and fourth defendant, seeking an order that the land was vested in her ('the 2004 case'). The second defendant obtained a judgment in default ('JID') against the first defendant for failure to attend the court. A consent order was entered between the second and fourth defendants for the fourth defendant to register the second defendant as the land proprietor and that all dealings by the first defendant in relation to the land were not valid. In 2016, the plaintiff successfully set aside the JID and the consent judgment at another High Court. The High Court further opined that the plaintiff's title had been obtained for valuable consideration and without knowledge of the second defendant's interest. Hence the present appeal. The

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issues that arose in this appeal were: (a) whether another court of concurrent jurisdiction could set aside the JID and consent judgment; (b) whether the principle of res judicata applied; and (c) whether the plaintiff's title to the land was indefeasible.

Held, dismissing the appeal with costs:

(1) The plaintiff was not a party to the 2004 case. The consent judgment obtained and the JID were made without full disclosure of facts. The plaintiff had correctly filed a separate action to set aside the judgment. The High Court judge had not erred in allowing the setting aside. An order made without an interested party being given the opportunity to be heard is liable to be set aside *ex debito justitiae* and must be held void (see paras 27 & 29).

(2) The doctrine of res judicata should be strictly applied. The issue between the plaintiff and the second and third defendants were not adjudicated in the 2004 case. Therefore, the default judgment should not be binding against the plaintiff. This also applied to the consent judgment which the plaintiff had nothing to do with. Furthermore, the cause of action in the instant case was distinct and separate from that of the 2004 case (see paras 30–31).

(3) There was no evidence of fraud on the part of the plaintiff when he entered into the SPA. There was also no provision in the National Land Code which defeated the indefeasibility of title of the plaintiff merely on the failure of the registrar to notify the caveator of the removal of caveat from land. Therefore, the plaintiff's land title was indefeasible (see paras 37 & 39).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membenarkan tindakan responden pertama ('plaintif') yang memohon pengisytiharan bahawa dia adalah pembeli bona fide dan pemilik sebidang tanah. Tanah tersebut, pada asalnya didaftarkan di bawah bapa ('TYL') responden kedua ('defendan pertama'). Apabila TYL meninggal dunia, menurut perintah pembahagian, defendan pertama mewarisi tanah tersebut. TYL mempunyai seorang saudara lelaki, yang telah meninggal dunia ('TTK'), yang, semasa hayatnya, berkahwin dengan perayu pertama ('defendan kedua') dan mereka mempunyai seorang anak lelaki, perayu ketiga ('defendan ketiga'). Defendan kedua dan ketiga menghujahkan tanah tersebut didaftarkan di bawah nama TYL dan TYL telah memindah milik tanah tersebut kepada defendan kedua dengan bersaksikan defendan pertama. Pada tahun 2004, defendan kedua memfailkan tindakan di Mahkamah Tinggi terhadap defendan pertama dan keempat, memohon perintah bahawa tanah tersebut terletak hak padanya ('kes 2004'). Defendan kedua memperoleh penghakiman ingkar ('JID') terhadap

defendan pertama atas kegagalannya menghadiri mahkamah. Perintah persetujuan dimasukkan antara defendan kedua dan keempat bagi defendan keempat untuk mendaftarkan defendan kedua sebagai tuan tanah dan semua urusan oleh defendan pertama berkaitan dengan tanah tersebut tidak sah. Pada tahun 2016, plaintif berjaya mengetepikan JID dan penghakiman persetujuan di Mahkamah Tinggi yang lain. Mahkamah Tinggi selanjutnya berpendapat bahawa hak milik plaintif telah diperolehi untuk pertimbangan satu nilai dan tanpa pengetahuan mengenai kepentingan defendan kedua. Oleh itu, rayuan ini. Isu-isu yang timbul dalam rayuan ini adalah: (a) sama ada mahkamah lain, yang mempunyai bidang kuasa serentak boleh mengetepikan JID dan penghakiman persetujuan; (b) sama ada prinsip res judicata terpakai; dan (c) sama ada hak milik plaintif ke tanah tidak boleh disangkal.

Diputuskan, menolak rayuan dengan kos:

(1) Plaintif bukan pihak kepada kes 2004. Penghakiman persetujuan yang diperoleh dan JID dibuat tanpa pendedahan penuh fakta. Plaintif telah memfailkan tindakan yang berasingan untuk mengenepikan penghakiman. Hakim Mahkamah Tinggi tidak salah dalam membenarkan pengetepian tersebut. Perintah yang dibuat tanpa memberi peluang kepada pihak berkepentingan didengar wajar diketepikan *ex debito justitae* dan harus diputuskan sebagai tidak sah (lihat perenggan 27 & 29).

(2) Doktrin res judicata harus terpakai dengan tegas. Isu antara plaintif dan defendan kedua dan ketiga tidak dihakimi dalam kes 2004. Oleh itu, penghakiman ingkar tidak boleh mengikat plaintif. Ini juga terpakai pada penghakiman persetujuan yang mana plaintif tidak ada kena-mengena dengannya. Selain itu, kausa tindakan dalam kes ini berbeza dan berasingan daripada kes 2004 (lihat perenggan 30–31).

(3) Tidak ada bukti penipuan di pihak plaintif apabila dia memasuki SPA. Tidak ada juga peruntukan dalam Kanun Tanah Negara yang menewaskan kebolehsangkalan hakmilik plaintif semata-mata atas kegagalan Pendaftar untuk memaklumkan pengkaveat akan penyingkiran kaveat dari tanah. Oleh itu, hak milik tanah plaintif adalah hak milik tak boleh sangkal (lihat perenggan 37 & 39).]

Notes

For cases on indefeasibility of title in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3718–3724.

For cases on jurisdiction in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5994–6389.

Cases referred to

AMDB Factoring Sdn Bhd (formerly known as Arab-Malaysian Enterprises Sdn Bhd) v Iszajaya Sdn Bhd & Ors [1997] 5 MLJ 402, HC (refd)

Asia Commercial Finance (M)(Bhd) v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin v Arab Malaysian Finance [1998] 1 MLJ 393, FC (refd)

Cameron v Cole [1944] 68 CLR 571, HC (refd)

Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah [2005] 7 MLJ 35, HC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Choong Howei v Cheah Choo Eng & Ors and another appeal [2015] 6 MLJ 95; [2015] 9 CLJ 689, CA (refd)

Haji Junus v Chik & Anor [1963] 1 MLJ 303, HC (refd)

Hock Hue Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd [2014] 5 MLJ 676, CA (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761; [1996] 2 CLJ 185, FC (folld)

Puah Bee Hong v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal [1994] 2 MLJ 601, FC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (folld)

Legislation referred to

National Land Code ss 326, 340(2), (2)(b), (2)(c), 417, Forms 14A, 19C
Rules of Court 2012 O 15, O 16, O 16 r 8

Appeal from: Writ of Summons No 21NCVC-29–03 of 2013 (High Court, Shah Alam)

Selva Ponniah (Jasvinder Singh dan Pathmarajah with him) (Mazwan Pathma & Co) for the plaintiff.

Esther G Jayaraja (Tan Yee Chian with her) (Chew, Das & Jayaraja) for the first respondent.

Mohd Akhbar bin Mohd Ibrahim (Jayaratnam & Partners) for the second respondent.

Naziah bt Mokhtar (Selangor State Legal Advisor, Selangor State Legal Advisor's Officer) for the third defendant.

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the High Court at Shah Alam which had on 3 February 2016 allowed the plaintiff/first respondent's action for a declaration that he is a bona fide purchaser and proprietor of a piece of land known as Hakmilik Geran No GM 175, Lot No 752, Mukim Ijuk, Daerah Kuala Selangor, Selangor; which he had purchased pursuant to a sale and purchase agreement ('SPA') dated 27 January 2005 between him and the first defendant/second respondent. The High Court also allowed the plaintiff's other reliefs, namely that the transfer of the said land from the plaintiff/first respondent to the second defendant /first appellant by presentation No 1767/2012 and from the second defendant/first appellant to the third defendant/third appellant by presentation No 3 are not valid, and costs.

[2] For the purpose of this appeal, parties would be referred to as they were in the High Court.

[3] The land was originally registered under the first defendant's father's name, Tan Yew Lin ('TYL'). TYL had passed away on 23 October 1995.

[4] Upon TYL's death, vide a distribution order dated 22 December 1997 as shown at pp 128–129 of record of appeal *Jld* 2(1), the first defendant inherited the land. TYL had a brother by the name of Tan Tuan Kam ('TTK'). TTK married the second defendant and they have a son who is the third defendant. TTK had also passed away.

[5] It was the second and third defendants' contention that the land was registered under TYL's name although TTK was the one who bought it, because TTK wanted to help TYL who was then unemployed; and upon a promise made by TYL that he would later transfer the land to TTK. It was also the second and third defendants' contention that before the first defendant was born in 1972, TTK's family developed the land and planted rubber trees, palm oil and fruit trees on it and shared the proceeds from the income obtained therefrom.

[6] The second and third defendants also contended that TYL had indeed signed Form 14A on 30 September 1995 to transfer the land to the second defendant in the presence of the first defendant. However the said Form 14A was rejected by the land office as the first defendant had subsequently entered a caveat on the land.

[7] The second defendant had on 24 September 2004, filed a Civil Suit No 21–211 of 2004 ('2004 case') against the first and fourth defendants seeking for the court's order to declare that the land was at all material time

vested in her, for the first defendant to transfer the land to her and for any caveat entered by the first defendant be revoked.

[8] On 16 December 2010, the second defendant managed to obtain a judgment in default in the 2004 case against the first defendant for failure to attend the court and comply with the court's direction to appoint a lawyer to represent him.

[9] Following the judgment in default, on 5 April 2011 a consent order was entered between the second and fourth defendants in the 2004 case for the fourth defendant to register the second defendant as the land's proprietor; and it was also ordered by consent that all dealings by the first defendant in relation to the land were not valid.

ISSUES

(a) whether the judgment in default and the consent judgment both dated 16 December 2010 can be set aside by the court of concurrent jurisdiction;

(b) whether the principle of res judicata apply; and

(c) whether the plaintiff's title to the land is indefeasible.

DECISION OF THE HIGH COURT

[10] The learned High Court judge was of the view that the judgment in default and the consent judgment both dated 16 December 2010 can be set aside as the defendants were aware of the plaintiff's interest in the land but nevertheless proceeded without due regard to the interest of the plaintiff. Her Ladyship relied on the decision of the Federal Court in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance* [1998] 1 MLJ 393 and of the Supreme Court in *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761; [1996] 2 CLJ 185. The following is Her Ladyship's findings:

> [31] Upon the evidence in full trial, this court finds that D2, D3 and D4 had been aware of the plaintiff's interest. This is evident from DW2 (D2 and D3), the lawyer who represented them in 2004 case when he was referred to B76–78 and B101–102 and that he prayed for an order as per B77(e) because he knew of third party interest, replied he had done a land search and was aware of third party interest and in re examination he knew of the third party through search made before this application.
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> [32] D2 did not give evidence and D3 stated he is illiterate and all he knows is his mother transferred the land to him and as to whatever transpired his lawyer knows.
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> ...
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> [35] The consent order as in B76–78, inter alia, required D4 to accept Form 14A filed by D2, to register D2 as the proprietor of the land and that all dealings by D1

in relation to the land declared as not valid due to the unless order. Hence when the unless order was made at the time of consent judgment D2 and D3 knew of the plaintiff's interest in land but nevertheless proceeded without due regard to the interest of the plaintiff being the registered proprietor as at 27 June 2005.

[11] Her Ladyship further found that res judicata does not apply as there was no consideration of the merits in the 2004 case.

[12] On whether the plaintiff's title is indefeasible, the learned High Court judge found that it had not been shown the exception in s 340(2) of the National Land Code ('the NLC') applied. Her Ladyship was satisfied that the plaintiff's title had been obtained for valuable consideration and without knowledge of the second defendant's interest. The following is what Her Ladyship found:

25. As to whether the plaintiff had notice of D2's interest in the land such that his title was obtained by fraud it was his evidence he only knew of 2004 case when he tried to enter a caveat on 13 September 2012. In cross examination by D2 and D3's lawyer he disagreed he knew of D2's caveat when he bought the land. In cross examination by D4's lawyer he agreed his application to enter the caveat was rejected due to the court order of 6 July 2012. It was also the evidence of D1 and PW2 in cross examination by D2 and D3's lawyer they had informed the plaintiff of 2004 case before the S&P was signed. It was thus submitted this constituted knowledge on the part of the plaintiff of D2's interest. However this court agrees with the plaintiff's lawyer submission it was never put to the plaintiff in cross examination he had been informed either by D1 or PW2 of this and the fact of P not being cross examined on his evidence he only knew of D2's interest in 2012. This supports the inference the plaintiff only knew of D2's interest when his application to enter a caveat on 13 September 2012 was rejected by the land office which led to the filing of this instant case on 18 March 2013. There was therefore no evidence of fraud on Plaintiff's part when he entered into S&P.

SUBMISSIONS AND DECISION

[13] We should first briefly deal with the submissions made by the parties before we embark on our decision. On the first issue, learned counsel for second and third defendants argued that the learned High Court judge erred when she set aside the judgment in default and the consent judgment both dated 16 December 2010 as they were neither illegal nor tainted with lack of jurisdiction. He also relied on the case of *Badiaddin* and also the Federal Court decision in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 wherein it was held that the High Court cannot set aside a final judgment or order obtained from another High Court unless it was made in contrary to a statutory provision which renders it null and void on the grounds of illegality and lack of jurisdiction which was not the case in this appeal.

[14] It was also the second and third defendants' submissions that the principle of res judicata applies as the plaintiff had filed an application to intervene in the 2004 suit but it was disallowed by the Shah Alam High Court on 16 April 2015 and his appeal to the Court of Appeal was dismissed on 15 September 2016. He submitted that the learned High Court judge erred when Her Ladyship did not give due consideration to the application to intervene by the plaintiff.

[15] Learned counsel for the second and third defendants also submitted that the plaintiff was not a bona fide purchaser of the said property as he did not purchase the property in good faith due to his knowledge of the pending 2004 suit, either directly by virtue of being informed by his solicitor, Messrs Karam Singh Sangha who was also the solicitor on record for the first defendant, who was the defendant in the 2004 civil suit; or indirectly by virtue of his solicitor's knowledge.

[16] It was further submitted by learned counsel for the second and third defendants that the registration of the plaintiff's name in the said land was void pursuant to s 340(2)(b) of the NLC; for non compliance of s 326 of the NLC. He submitted that there was a breach due to the failure of the land office to issue Form 19C to the second defendant giving her notice of an application to remove her private caveat.

[17] Learned counsel for the plaintiff on the other hand submitted that the judgment in default and the consent judgment were obtained without full disclosure of facts as neither was the sale and purchase of the land disclosed to the court nor was the plaintiff added as a party to the suit. The order was made by the court without knowledge of the existence of the bona fide purchaser. The failure to make the plaintiff as a party of the 2004 case should not then bind the plaintiff to the judgment without being given the fundamental right to be heard as it would amount to a severe injustice. As such the judgment should accordingly be set aside. Learned counsel for the plaintiff relied on, inter alia, the case of *AMDB Factoring Sdn Bhd (formerly known as Arab-Malaysian Enterprises Sdn Bhd) v Iszajaya Sdn Bhd & Ors* [1997] 5 MLJ 402 and the case of *Asia Commercial Finance (M)(Bhd) v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

[18] Based on the same reason, she submitted that the principle of res judicata is therefore not applicable. Especially so when the judgment in default was not obtained against the plaintiff but the first defendant; thus it should not be binding against the plaintiff.

[19] Learned counsel for the plaintiff also submitted that the second and third defendants had failed to challenge the evidence of the plaintiff that he did

not have knowledge of their interest in the land. She cited the case of *Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah* [2005] 7 MLJ 35 and submitted that the second and third defendants must be deemed to have accepted the evidence. Most importantly she further submitted, the plaintiff is the bona fide purchaser as the land was initially registered in the name of the first defendant's late father. Thereafter it was inherited by the first defendant. The plaintiff has the subsequent registered title as he subsequently purchased from the first defendant.

[20] On the issue of failure to comply with s 326 of the NLC, learned counsel for the plaintiff submitted that it was the failure on the part of the land office and nothing to do with the indefeasible title of the plaintiff.

[21] We had considered the submissions made by the parties, oral as well as written and we had perused the records of appeal which include the grounds of judgment of the learned High Court judge.

[22] On the first issue, we had no quarrel that the judgment in default and the consent judgment both dated 16 December 2010 were made regularly by the court of competent jurisdiction. But the question that we were required to answer was whether another court of concurrent jurisdiction could set it aside. The Federal Court in *Puah Bee Hong v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 had, inter alia, held that an order of a superior court such as the High Court, until it is set aside, must be obeyed by everyone whether its validity is challenged or not. The principle had been made clear by the Federal Court it in *Badiaddin*'s case. At p 409 of the case, it was stated as follows:

> It is of course settled law as laid down by Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaac v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and violability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the courts '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the

A right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice' ...

B **[23]** The decision in *Badiaddin* was followed by another decision of the Federal Court in *Serac Asia Sdn Bhd*. As such, at a glance, the learned High Court judge seemed to have erred in allowing the plaintiff's claim and making the order which has the effect of setting aside an order or judgment of a High Court of concurrent jurisdiction.

C **[24]** However, we do not think by citing *Badiaddin* or *Serac Asia Sdn Bhd* that was the end of the plaintiff's claim. The learned High Court judge had made a finding of fact that the second, third and fourth defendants were all aware of the plaintiff's interest in the land when the judgment in default and D the consent judgment were obtained. They however chose to disregard it. On this, we found that another Federal Court decision of *Khaw Poh Chhuan*, cited by the learned High Court judge was on point. At p 782, Peh Swee Chin FCJ had stated as follows:

E The next question that arises naturally is that with regard to the relief of setting aside the consent order, seeing that he was not a party to the originating summons in which the consent order was made, can the assignee claim such a relief?

F In our view, the assignee should have been made a party in the family settlement agreement and in the originating summons in place of the assignor who deliberately disowned the assignment. All the other parties were aware of the assignment because of another previous originating summons which was filed for distribution of the assets of the deceased father in accordance with the Distributions Act 1958. All such parties chose to treat the assignee as non-existent and to dispose of the interest of the assignee without his knowledge and consent. We therefore hold that the assignee has the locus standi to claim the relief of setting aside the consent order.

G **[25]** This court in *Choong Howei v Cheah Choo Eng & Ors and another appeal* [2015] 6 MLJ 95; [2015] 9 CLJ 689 after citing, inter alia, the Federal Court in *Badiaddin* and *Serac Asia* had held that fraudulent concealment of H material facts from the court will also justify the setting aside of an order. This can be seen at p 109 (MLJ); p 702 (CLJ) of the judgment, in para 34 as follows:

I [34] We are of the view that in the present case based on the authorities the respondents can apply to the court to impugn the order made in 1 May 1926 via a separate court action, instead by way of an appeal, because the respondents' allegation is that there had been a fraudulent concealment of a material fact. Thus the matter comes under the exception to the general rule ...

[26] Further on this issue, this court had also in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 held, inter alia, as follows:

(6) The vital point in the whole case was that the respondent actively concealed all the relevant matters from the High Court when it applied for the order of sale. As a litigant moving the court, it was incumbent for the respondent to display uberrimae fides. The respondent having actively practised a serious deception upon the court ought not to have benefit of the judgment it had obtained.

[27] In this instant case, it is crystal clear that the plaintiff was not a party to the 2004 case. There was ample evidence as found by the learned High Court judge that the consent judgment obtained and the judgment in default against the defendant were made without full disclosure of facts as neither the SPA of the land disclosed to the court nor was the plaintiff added as a party to the 2004 case. And the plaintiff in our view had correctly filed this separate action to set the said judgment aside.

[28] Further it had been pointed out to us by learned counsel for the plaintiff that the fourth defendants witness, Mohd Muslim bin Taib and the second and third defendants' witness, their solicitor for the previous suit, knew of the plaintiff's interest in the said land when the consent judgment was entered into on 5 April 2011. This court was referred to the cross-examinations of Cantius Camoens at p 106 of the *rekod rayuan Jld* 2(1) (*Bahagian* B & C):

Question No 171: I refer you to page 76–78 and 101–102 of the common bundle, at page 77 prayer (e), 'semua urusan telah D1 berkenaan dengan tanah tersebut tidak sah kerana perintah berftarikh 16/12/2010'. I put it to you, you prayed for that prayer and that prayer is needed because you knew there was a third party's interest in the land?

Answer No 172: Yes, I've done the search and I knew there was a third party interest.

Question No 175: Mr Cantius, can you confirm that, was there any application filed by the Second Defendant in the old suit for the senior registrar to sign the Form 14A ON BEHALF of Tee Kim Tiam and in favour of Ang Game Hong, Second Defendant?

Answer No 176: I believe there was a summons in chambers, yes, following which the order was granted.

Question No 177: I put it to you, that application was not served on the plaintiff?

Answer No 178: No, it was not served on the plaintiff.

He submitted, and we agreed, that the solicitor's testimony clearly shows that he knew of the existence of the plaintiff's rights on the said land despite the fact that they had entered into a consent judgment dated 5 April 2011 as well as applied for the senior assistant registrar to sign Form 14A on behalf of the plaintiff.

Learned counsel for the plaintiff also referred us to the cross-examinations of Mohd Muslim bin Taib at p 113 of the *rekod rayuan Jld* 2(1) (*Bahagian* B & C):

A Question No 269: Saya cadangkan, apabila penghakiman persetujuan dimasukkan pada 5 April 2011, seperti di muka surat 76–78, pihak Tuan mempunyai pengetahuan dan juga akses tentang kepentingan Tee Kim Tiam?

Answer No 270: Setuju.

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[29] Therefore, following the authorities as cited earlier and on the reasons as explained above we were of the view that the learned High Court judge had not erred in allowing the setting aside. Further we were of the view that it is fundamental principle of natural justice, applicable to all courts that an order C made without an interested party being given the opportunity to be heard is liable to be set aside *ex debito justitiae* and must be held as void (see *Cameron v Cole* [1944] 68 CLR 571).

[30] Next we shall deal with the second issue as to whether the principle of D the res judicata applies. This issue is actually related to the first issue. It was our view, like in the first issue, the same argument can be used here. The position of the law is clear following the Federal Court in *Serac Asia Sdn Bhd* which adopted its decision in another case ie *Hock Hue Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 which, inter alia, held that the court had no power under E any application in the same action to set aside a judgment regularly obtained after it had been entered unless it is a judgment by default or made in the absence of a party at a trial or hearing. In the instant case, the plaintiff's position is stronger. Not only in 2004 case it was a judgment in default, the default judgment was not against the plaintiff but the first defendant and that F the plaintiff was not a party to the 2004 case. As submitted by learned counsel for the plaintiff and we agreed, the issue between the plaintiff and the second and third defendants were not adjudicated in the 2004 case. Thus the default judgment should not be binding against the plaintiff. So also with the consent G judgment, which the plaintiff had nothing to do with.

[31] We were of the view that the doctrine of res judicata should be applied strictly when it concerns with the judgment in default and consent judgment as they are not a final judgment on the merits. There had never been any issue H between the plaintiff and the second and third defendants that had been heard and tried in the 2004 case that it can legitimately be said that the respective liability of each party was very fully litigated. Moreover the cause of action in this instant case is distinct and separate from that in the 2004 case. In the present case, the plaintiff's cause of action is that he has the indefeasible title in I the land while in 2004 case the second and third defendants' cause of action was based on their right in the land as against the allegation of fraud committed by the first defendant. Hence, we agree with the learned High Court judge that res judicata does not apply in the instant case (see *Haji Junus v Chik & Anor* [1963] 1 MLJ 303; *AMDB Factoring Sdn Bhd (formerly known as*

Arab-Malaysian Enterprises Sdn Bhd) v Iszajaya Sdn Bhd & Ors [1997] 5 MLJ 402).

[32] The third and last issue is whether the plaintiff's title to the land is indefeasible. The circumstances under which an indefeasible title can be defeated are set out by s 340(2) of the NLC. It provides as follows:

> The title or interest of any such person or body shall not be indefeasible —
>
> (a) In any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[33] It was contended on behalf of the second and third defendants that the plaintiff's title in the land is defeasible on two grounds:

(a) there was fraud on the part of the plaintiff as the plaintiff was aware of the 2004 case when he entered into SPA with the first defendant; and

(b) the registration was obtained by insufficient instrument wherein s 326 had been breached as the second defendant was not notified of the removal of her private current owner the land.

[34] The learned High Court judge had made a finding of fact that there was no evidence of fraud on the plaintiff's part when he entered into SPA. Her Ladyship found the fact that it was never put to the plaintiff in cross-examination that he had been informed by either D1 or PW2 of the 2004 case and the fact that the plaintiff was not being cross-examined on his evidence that he only knew of the second defendant's interest in 2012 supported the inference that the plaintiff only knew of the second defendant's interest when his application to enter a caveat was rejected on 2012.

[35] We found no reason to disagree with this finding of facts by the learned High Court judge. In *Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah* [2005] 7 MLJ 35, it was stated:

> [33] In *Phipson on Evidence* (11th Ed) at para 1544, the learned authors suggest examples by way of an exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, namely, where the story is of itself an incredible or romancing character or that an abstention arises for the sake of convenience in order to save time and in a situation where several witnesses are called to testify on the same point and there is no necessity to cross-examine proves fatal. It is only right and proper that witnesses should be

challenged in the witness box so that it is announced to the whole world at large, so to speak, that the evidence tendered has been challenged and is not accepted. When the opponent has declined to put his essential and material case in cross-examination, just like the present case at hand, then it must follow as the night the day that he believed the testimony that has been given and that he could not dispute that evidence at all (*AE Carapiet v AY Derderian* (1961) Cal 359).

[36] Further, the best evidence rule requiring proof not by the 'best evidence' but by the 'best evidence available' (see *Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd* [2014] 5 MLJ 676). We therefore agreed with the plaintiff that the failure on the part of the second and third defendants to make use of the best evidence available to prove their case should bar them from disputing on the matters coinciding with the plaintiff's knowledge of their interest before this court.

[37] Thus, the learned High Court judge, in our view, was correct to conclude that there was no evidence of fraud on the part of the plaintiff when he entered into the SPA. Learned counsel for the plaintiff submitted that the knowledge of the first defendant's solicitor is a non-issue because there was no impediment and/or encumbrance with regards to the said land when the said solicitor was hired for the sale and purchase transaction between the plaintiff and first defendant. We found the second and third defendants cannot clearly and fully show the extent of the involvement of the plaintiff's solicitor, Messrs Karam Singh Sangha & Co in defending the first defendant in the 2004 case.

[38] On the issue of breach of s 326 of the NLC and thus the insufficient instrument in registering the title, s 326 of the NLC provides as follows:

> 326 Removal of private caveats by Registrar.
>
> (1) Any person or body whose land or interest is bound by a private caveat may at any time apply to Form 19H to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.
>
> (1A) On receiving any application for removal under this section, the Registrar shall —
>
> (a) Serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
>
> (b) Make an endorsement on the registrar document of title that the notice in Form 19C has been served on the person or body at whose instance the caveat was entered and of the date of such service, and shall sign and seal the endorsement.

[39] Learned counsel for the second and third defendants submitted that the High Court judge only considered s 340(2)(c) of the NLC when the relevant provision was in fact s 340(2)(b) which deals with registration by mean of

insufficient instrument. He quoted the Federal Court case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1. However, with due respect, *Samuel Naik* merely defines the phrase 'insufficient or void instrument' for the purpose of s 340(2)(b) of the NLC. It talked about the voidness of the instrument itself for reasons relating to the capacity of the parties for example, or it not being signed by authorised attorney. Whereas s 326 talks about the removal of private caveat and the registrar's duty to inform the caveator of the intended removal. It has got nothing to do with the indefeasibility of title of the plaintiff. We are of the opinion, there is no provision in the NLC which defeats the indefeasibility title of the plaintiff merely on the failure of the registrar to notify the caveator of the removal of the caveat. Hence we give a positive answer to the third issue, namely that the plaintiff's land title is indefeasible.

THE FIRST AND FOURTH DEFENDANT

[40] The first and fourth defendants had been named as the second and third respondents respectively in this appeal by the appellant ie the second and third defendants. In their statement of defence, the second and third defendants had made allegations that the plaintiff, the first and the fourth defendants had committed fraud against the second and third defendants. However there was no counter claim made against them. It was mere averment.

[41] The learned Selangor State Advisor ('LA') in his written submission filed on behalf of the fourth defendant argued that the claim by the second and third defendants is therefore defective for non-compliance with O 15 and O 16 of the Rules of Court 2012 for what they should have done was to either file a counter claim or a third party proceeding or notice of contributing or indemnity against the fourth defendant in order to make the fourth defendant liable for any wrongdoing if any.

[42] We had scrutinised the learned LA's submission. We were of the view that O 16 r 8 is the relevant provision which should be applicable here. For ease of reference we set out the provision as follows:

> Claims and issues between a defendant and some other party (O 16, r 8)
>
> (1) Where in any action a defendant who has entered an appearance —
>
> (a) Claim against a person who is already a party to the action any contribution or indemnity;
>
> (b) Claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) Requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only

A as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action, then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.

B

(2) Where a defendant makes such a claim as is mentioned in paragraph (1) and that claim could be made by him by counterclaim in the action, paragraph (1) shall not apply in relation to the claim.

C (3) No appearance to such a notice shall be necessary if the person on whom it is served has entered an appearance in the action or is a plaintiff therein, and the same procedure shall be adapted for the determination between the defendant by whom, and the person on whom, such a notice is served of the claim, question or issue stated in the notice as would be appropriate under this order if the person served with the notice were a third party and

D (where he has entered an appearance in the action or is a plaintiff) had entered an appearance to the notice.

[43] Based on the above provisions, we opined that what the second and third defendants should have done was to either file a counterclaim against the

E first and fourth defendants or to issue and serve a notice containing a statement and grounds of their claim or issues required to be determined. Making averment in the statement of defence is not sufficient to make the first and fourth defendants liable against them.

F CONCLUSION

[44] For all the reasons aforesaid we found no reason to disturb the decision of the learned High Court judge. We therefore affirm Her Ladyship's decision as reflected at pp 7–8 of the record of appeal Vol 1. Consequently we ordered

G the plaintiff to take step under s 417 of the NLC to enable his name be re-registered on the land title. The appeal was therefore dismissed with costs.

Appeal dismissed with costs.

H Reported by Afiq Mohamad Noor

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